(13) (12)

No. 92-757 and No. 92-938

FILED
JUN 25 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,
Petitioner,
v.
USI FILM PRODUCTS, BONAR PACKAGING, INC., and QUANTUM CHEMICAL CORPORATION,
Respondents,

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
v.
ROADWAY EXPRESS, INC.,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

---

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Attorney for Amicus Curiae The Chamber of Commerce of The United States of America

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
KIMBERLY L. JAPINGA
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE LANGUAGE AND LEGISLATIVE HISTORY CLEARLY DEMONSTRATE THAT THE 1991 CIVIL RIGHTS ACT WAS INTENDED TO BE PROSPECTIVE ONLY	8
A. The President's Veto Of The 1990 Civil Rights Act, Based In Part On The Bill's Retroactivity, Ensured That The 1991 Act Would Be Given Prospective Effect Only	8
1. When Congress ultimately refused to include the retroactivity language from the 1990 civil rights conference bill in the Civil Rights Act of 1991, Congress clearly indicated that the Act should be prospectively applied	8
2. The House's 1991 handling of the Bush Administration's alternative to H.R. 1 was different from Congress's deletion of retroactive language from H.R. 1 and thus does not indicate a retroactive application of the 1991 Act	11
B. Floor Statements And Section-by-Section Analyses Submitted By The Prime Movers Of The 1991 Compromise Bill Clearly Demonstrated That The Act Would Operate Prospectively Only	12
II. SECTIONS 402(b) AND 109(c) OF THE CIVIL RIGHTS ACT OF 1991 DO NOT EVIDENCE AN INTENT TO APPLY THE REMAINING PROVISIONS OF THE ACT RETROACTIVELY	13

TABLE OF CONTENTS—Continued

Page

A. The Language Of The *Wards Cove* Exception Does Not Evidence Any Congressional Intent To Apply The Remainder Of The Act Retroactively 13

B. The Non-Retroactive Language In The Extraterritorial Exception Does Not Indicate That Congress Intended The Act Generally To Apply To Pending Cases 16

C. The Circuits That Applied The Act Only Prospectively Have Found That Section 109(c) And 402(b) Were Only To Be Reassurances That The Act Will Not Apply To Specific Cases 17

III. IN ADDITION TO THE LEGISLATIVE HISTORY'S PROSPECTIVE APPLICATION, THE CIVIL RIGHTS ACT OF 1991 AFFECTS SUBSTANTIVE RIGHTS AND LIABILITIES OF INDIVIDUALS AND THEREFORE MUST BE APPLIED PROSPECTIVELY 19

A. This Court Held In *Bennett* That A Statute Is Applied Prospectively When It Affects Substantive Rights And Liabilities. Since The Civil Rights Act Of 1991 Affects Substantive Rights And Liabilities, It Must Be Applied Prospectively 19

B. Application Of The Provisions Of The Civil Rights Act Of 1991 Would Substantively Change The Rights Of The Parties To Litigation Pending At The Time Of Enactment.. 22

1. The provisions permitting jury trials and punitive and compensatory damages are substantive changes to the law 22

2. Other provisions of the Act eliminate substantive defenses previously available to employers 23

TABLE OF CONTENTS—Continued

Page

C. The Civil Rights Act Of 1991 Is Not Merely "Restorative"; The Act Affects Substantive Rights And Liabilities And Thus Must Be Applied Prospectively. An Explicit Intent To Restore the Law Retroactively Is Necessary For A Retroactive Application; Inferring Retroactive Intent Is Not Enough 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

	Page
Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)	22, 23
Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990)	25
Banas v. Am. Airlines, 969 F.2d 477 (7th Cir. 1992)	22
Bennett v. New Jersey, 470 U.S. 632 (1985)	7, 20, 21, 29
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)	13, 20, 21
Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974)	6-10, 19, 20, 21
Butts v. City of N.Y. Dept. of Housing, 61 Fair Empl. Prac. Cas. (BNA) 579 (2nd Cir. 1993)	17
Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992)	17
DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991)	21, 25, 27, 28
EEOC v. Arabian American Oil Co., 111 S.Ct. 1227 (1989)	3, 16
Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992)	4, 10, 16, 17, 25, 27
Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992)	3, 17, 18, 21
Grove City College v. Bell, 465 U.S. 555 (1984)	26, 27
Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Co. 1992)	16
Harvis, Rivers and Davison v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992)	4, 5
Hazen Paper Co. v. Biggins, —— U.S. ——, 113 S.Ct. 1701 (1993)	2
Johnson v. Rice, 58 Fair Empl. Prac. Cas (BNA) 31 (S.D. Ohio 1992)	22
Johnson v. Uncle Ben's Inc., 965 F.2d 1363 (5th Cir. 1992)	16, 17, 18, 22
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570 (1990)	13
Landgraf v. USI Film Products, Bonar Packaging Inc.. and Quantum Chemical Corp., 968 F.2d 427 (5th Cir. 1992)	4, 5

TABLE OF AUTHORITIES—Continued

	Page
Leake v. Long Island Jewish Medical Ctr., 695 F. Supp. 1414 (E.D.N.Y. 1988)	26
Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989)	3, 24
Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2nd Cir. 1985)	29
Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992)	3
Maddox v. Norwood Clinic, 783 F. Supp. 582 (N.D. Ala. 1992)	16, 23
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)	28
Martin v. Wilks, 109 S.Ct. 2180 (1989)	3, 24
Memphis Community School District v. Stachura, 477 U.S. 299 (1991)	23
Mozee v. Am. Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 207 (1992)	12, 16, 17, 18, 22
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	24
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	4, 24
Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989)	3, 24
Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993)	12
Thompson v. Johnson & Johnson Mgmt. Info. Crt., 783 F. Supp. 893 (D.N.J. 1992)	16
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	2
Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573 (11th Cir. 1993)	3, 17
Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86 (1992)	4, 22
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	2, 3, 18
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)	3

TABLE OF AUTHORITIES—Continued

DOCKETED CASES	Page
Atonio v. Wards Cove Packing Co., Inc., Nos. 91-35306, 35861 (9th Cir. brief filed on May 1992)	3
Rodriguez v. General Motors Corporation, No. 91-55170 (9th Cir. brief filed on May 13, 1992)	3
STATUTES	
Civil Rights Act of 1866, 42 U.S.C. 1981	3, 4, 22, 24
Civil Rights Act of 1991, P.L. 102-106 (1991)	*passim*
Section 101	4, 24
Section 102	9, 22, 26
Section 103	9
Section 104	9
Section 105(a) (2)	9
Section 107	9, 24
Section 109(c)	17, 19
Section 110	9
Section 402	13, 14
Section 402(b)	13, 14, 17, 19
Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*	*passim*
LEGISLATIVE	
136 Cong. Rec. S16418 (daily ed. Oct. 22, 1990)	9
137 Cong. Rec. H3397-H3909 (daily ed. June 4, 1991)	12
137 Cong. Rec. S15483 (daily ed. Oct. 1991)	13
137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991)	13, 15
137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991)	14, 16
137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991)	15, 16
S. 2104, 101st Cong., 2nd Sess. § 15 (1990)	6
H.R. 1, 102nd Cong., 1st Sess. 113 (1991)	9, 10, 11
MISCELLANEOUS	
The Federalist No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949)	28
President's Message To The Senate Returning Without Approval The Civil Rights Act of 1990 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
Petitioner,
v.
USI FILM PRODUCTS, BONAR PACKAGING, INC., and QUANTUM CHEMICAL CORPORATION,
Respondents,

No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
v.
ROADWAY EXPRESS, INC.,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

---

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief as

amici curiae. The written consents of all the parties have been filed with the Clerk of this Court. This brief argues for affirmance of the decisions of the courts below and thus supports the position of the respondents in both cases.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of discrimination. Its membership includes over 280 major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in 260 cases of importance to the business community. Many of those cases have been before this Court. For example, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); and *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S.Ct. 1701 (1993).

Substantially all EEAC and Chamber members, or their constituents, are employers subject to various equal em-

ployment laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1981, the statutes at issue herein. Moreover, many EEAC and Chamber members have made decisions regarding employment relationships, and litigation strategies in pending cases, based upon the state of the law as it existed prior to the enactment of the Civil Rights Act of 1991. P.L. 102-166 (1991).

Because of its interest in the application of the nation's equal employment laws, EEAC, since its founding in 1976, has filed over 320 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals, and various state supreme courts. As a part of this activity, EEAC participated as *amicus curiae* in many of the cases specifically addressed by provisions of the 1991 Act.[1] In addition, following passage of the 1991 Act, EEAC filed extensive comments regarding the issue of its retroactive application with the Equal Employment Opportunity Commission. EEAC also has filed briefs in almost all of the Circuits arguing that the 1991 amendments are not retroactive.[2] Thus, both EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in these cases. Indeed, EEAC and the Chamber are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties.

---

[1] Among the cases briefed by EEAC are: *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 754 (1989); and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

[2] *See e.g., Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); *Rodriguez v. General Motors Corporation*, No. 91-55170 (9th Cir. brief filed on May 13, 1992); and *Atonio v. Wards Cove Packing Co., Inc.*, Nos. 91-35306, 35861 (9th Cir. brief filed on May 1992).

STATEMENT OF THE CASE

These two cases have been consolidated for review by this Court. The first case, *Harvis, Rivers and Davison v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), involves a race discrimination claim brought under Title VII and 42 U.S.C. § 1981. The second case, *Landgraf v. USI Film Products, Bonar Packaging Inc., and Quantum Chemical Corp.*, 968 F.2d 427 (5th Cir. 1992), is a sexual harassment suit filed under Title VII. Both circuits considered the issue of whether the Civil Rights Act of 1991 should be applied retroactively to the plaintiffs' cases.

Both circuits held that the Civil Rights Act of 1991 was not retroactive. In *Harvis*, the court below adopted the reasoning of the courts in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) and *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86 (1992) which declined to apply § 101 of the 1991 Act to a claim under 42 U.S.C. § 1981 that was pending on appeal at the time of the enactment of the 1991 Civil Rights Act. The court declined to apply the Act retroactively and based its decision on the Act's language and legislative history and the effect the 1991 Act will have on the parties' substantive rights and liabilities.

The *Harvis* court followed *Fray*'s analysis of the legislative history of the 1991 Act. In *Fray*, the court examined the retroactive application of § 101 of the Civil Rights Act of 1991, which overruled the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Fray* held that the 1991 Act was not retroactive since a bill in 1990 specifically making the Act retroactive was vetoed by the President and Congress failed to override the veto. Since Congress deleted the retroactive language because it did not have the votes to override a veto of bill with a retroactive application, the court reasoned that the 1991 Civil Rights Act was prospective in its application. The *Fray* court stated the following:

> We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary.

Fray, 960 F.2d at 1377. The *Fray* court also noted that the sections of the 1991 Act that were made expressly prospective were included by retroactivity opponents to "hedge their bets." *Id.*

The Sixth Circuit also followed *Vogel*, which examined the Act as a whole and concluded that applying the Act retroactively would adversely affect the parties' substantive rights and liabilities. *Harvis*, 973 F.2d at 497. Since the Act would affect substantive rights, the court concluded that the Act should not be applied retroactively. *Harvis*, 973 F.2d at 496-97.

The issue of substantive rights and liabilities was the basis for the Fifth Circuit's decision in *Landgraf*. The court below held that the new availability of a jury trial and compensatory and punitive damages for Title VII claims should not be applied retroactively because it would affect substantive rights and liabilities.

The *Landgraf* court decided that a retroactive application of the Act would result in manifest injustice. In the case of jury trials, for example, the court held,

> We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. . . . To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted.

Landgraf, 968 F.2d at 432-433.

The Fifth Circuit was equally convinced that the Act's new provisions for compensatory and punitive damages should not be applied to pending cases. The court stated, "Retroactive application of th[ese] provision[s] would result in a manifest injustice. . . . The amended damage provisions of the Act are a seachange in employer liability for Title VII violations." *Id.* at 433. The court continued,

> It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose 'an additional or unforseen obligation' contrary to the well-settled law before the amendments.

Id. (quoting *Bradley*, 416 U.S. at 721).

SUMMARY OF ARGUMENT

The courts below properly held that the Civil Rights Act of 1991 is not retroactive, recognizing that the Act's language, legislative history, and effect on substantive rights and liabilities favor a prospective application of the Act to pending cases.

The legislative history of the 1990 conference bill and the 1991 Act clearly demonstrates that the Civil Rights Act of 1991 is to apply only prospectively, because the retroactivity language present in the 1990 bill is absent from the 1991 Act. The 1990 conference bill (S. 2104) contained specific and detailed provisions that provided for a retroactive application of the bill. After the bill passed both the House and the Senate, the President vetoed the bill and stated in his veto message that the bill was vetoed in part because of "unfair retroactivity rules." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

Because Congress could not garner the necessary votes to override the veto, the 1990 Act was not passed into law. When the 1991 Act progressed through Congress, it also initially contained specific language applying most provisions retroactively. However, Congress knew in 1991 that the Civil Rights Act would not be signed into law if it operated retroactively. Therefore, the retroactive language was deleted from the final version of the bill, thus indicating Congress's intent that the 1991 Civil Rights Act not be applied retroactively. Thus, as in *Bradley*, the ultimate exclusion of original language on the retroactivity issue provides evidence that Congress intended an opposite result. *Bradley*, 416 U.S. 716 n.23.

In addition, the two sections of the Act, §§ 402(b) and 109(c), that specifically reject a retroactive application do not create the inference that the remainder of the Act should be applied to pending cases. These sections were added as an insurance policy to protect constituent interests against any remote chance that the Act would be applied retroactively.

The Act also should be applied prospectively because it affects the substantive rights and liabilities of the parties. This Court held in *Bennett v. New Jersey*, 470 U.S. 632 (1985), that "statutes affecting substanitve rights and liabilities are presumed to have only prospective effect." *Id.* at 639.

Finally, Congress did not explicitly state that the changes made by the 1991 Act were retroactively restoring prior Congressional intent and thus, those changes should not be applied retroactively.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY CLEARLY DEMONSTRATE THAT THE 1991 CIVIL RIGHTS ACT WAS INTENDED TO BE PROSPECTIVE ONLY.

A. The President's Veto Of The 1990 Civil Rights Act, Based In Part On The Bill's Retroactivity, Ensured That The 1991 Act Would Be Given Prospective Effect Only.

1. *When Congress ultimately refused to include the retroactivity language from the 1990 civil rights conference bill in the Civil Rights Act of 1991, Congress clearly indicated that the Act should be prospectively applied.*

This Court has considered the issue of whether a statute may be applied retroactively, absent explicit retroactive language. In *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), this Court decided that it was permissible to retroactively apply an attorney's fee statute that took effect during the pendency of an appeal. But the Court so ruled because Congress had deleted language making the bill prospective only. Here, by contrast, Congress dropped language making the bill retroactive, thus evidencing an intent to delete any retroactive effect. This history, therefore, makes the 1991 Act prospective only.

In reaching its decision, the Court in *Bradley* thoroughly examined the legislative history of the statute in order to ascertain and construe the intent of Congress. 416 U.S. at 714. The Court found that the legislative history of the statute provided implicit support for a retroactive application. The Court found that the legislation that ultimately resulted in the attorney's fee statute grew out of a bill that initially had explicitly provided for a prospective application. 416 U.S. at 716 n.23. This prospective application language was deleted, however, in the Senate. *Id.* *Bradley* reasoned, therefore, that the evolution of the language provided implicit support for a

retroactive application. *Id.* Because it was apparent that the provision explicitly providing for prospective application had been stricken during the Congressional negotiations on the bill, the Supreme Court refused to read into the statute the very provision that Congress had eliminated. *Id.*

A similar legislative situation, with an opposite result, is presented in the Civil Rights Act of 1991. Section 15 of the 1990 Civil Rights conference bill (S. 2104 —the precursor to the Civil Rights Act of 1991) contained specific and detailed provisions that provided for retroactive application of the bill to "proceedings pending on or after" specific dates. S. 2104, passed by both the House and the Senate, was vetoed by the President on October 22, 1990. 136 Cong. Rec. S16418. The President's veto message indicated that the bill was vetoed in part because of "unfair retroactivity rules." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

In the next Congress, H.R. 1, the forerunner of the Civil Rights Act of 1991, initially contained almost the same retroactivity language as the vetoed 1990 bill. The original version of H.R. 1 contained the following language pertaining to the retroactive application of the bill to pending cases:

> (1) Section 102 shall apply to all proceedings pending on or commenced after June 5, 1989;
>
> (2) Section 103 shall apply to all proceedings pending on or commenced after May 1, 1989;
>
> (3) Section 104 shall apply to all proceedings pending on or commenced after June 12, 1989;
>
> (4) Sections 105(a)(1), 105(a)(3) and 105(a)(4), 105(b), 106, 107, 108, and 109 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) Section 105(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) Section 110 shall apply to all proceedings pending on or commenced after June 15, 1989.

See H.R. 1, 102nd Cong. 1st Sess. 113 (1991).

In addition to the above rules, H.R. 1 also contained complicated transition rules governing the application of the Act to orders already entered in pending cases. *Id.* This language was virtually identical to Section 15 of S. 2104, the failed 1990 bill. Although H.R. 1 passed the House, President Bush stated that he would veto the bill in that form. When the final Senate compromise was worked out, the retroactivity language was removed in the Senate version and it does not appear in the bill as ultimately enacted into law. *Compare* Section 402 with H.R. 1, 102nd Cong., 1st Sess. 113 (1991).

The specific deletion of the retroactivity provision illustrates Congress's desire to make the 1991 Act prospective only. Congress needed to present a bill to the President that operated prospectively because the President had stated that he would veto a bill with a retroactive application. Since Congress, as evidenced by its experience with the 1990 Act, did not have the necessary votes to override a presidential veto, it opted for language that the President would sign, and that language included a prospective application of the Act.

The court in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, agreed with this analysis:

> [T]he President [in 1990] vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive, even under *Bradley*. When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.

Id. at 1378.

In *Maddox v. Norwood Clinic*, 783 F. Supp. 582 (N.D. Ala. 1992), the District Court also held that the omission of retroactive language from the 1990 bill was indicative of Congress's intent to apply the 1991 Act prospectively.

> This legislative history demonstrates that Congress knew how to provide for retroactivity when it intended to do so; it also suggests that retroactivity was one of the issues on which compromise was necessary. The 1990 bill called for retroactivity but was vetoed, while the 1991 bill does not call for retroactivity; this indicates to the court a collective intent on the part of Congress to eliminate retroactive application of the statute. More importantly, the fact that H.R.1 (1991) had the retroactive language in it and S.1745 (1991) does not, coupled with the fact that the Act does not have the retroactive language, is even stronger evidence of this collective congressional intent. The court is satisfied that Congress did not intend retroactive application of the Act.

Id. at 585.

2. *The House's 1991 handling of the Bush Administration's alternative to H.R. 1 was different from Congress's deletion of retroactive language from H.R. 1 and thus does not indicate a retroactive application of the 1991 Act.*

On June 4, 1991, Rep. Michel offered the Bush Administration's alternative to H.R. 1, containing, among other things, a prospective application of the enactment section. The bill did not pass the Senate. The fact that the Administration's proposal did not garner a majority in the Senate is not, as the petitioners and supporting

amici argue, proof that the 1991 Act should be applied retroactively. Several factors differentiated the Senate's handling of the Administration's proposal from the vetoed 1990 Civil Rights bill.

The Administration's proposal, for example, was not a referendum on the issue of retroactivity. The debate centered on discussions of five Supreme Court decisions that Congress wanted either to modify or overturn—not on the prospective application of the Act. In fact, during debate on the Administration proposal, no discussion occurred regarding the prospective nature of Section 15. 137 Cong. Rec. H3897-H3909 (daily ed. June 4, 1991) (Discussion of H.R. 1357, the Michel substitute). Further, the bill was voted on *in toto* and the effective date provision was not taken up separately. Finally, it was clear to Congress from the President's 1990 veto message that a bill containing retroactivity rules would not be signed into law and that to be successful, a legislative proposal must not be retroactive. The treatment of the Administration's proposal, therefore, differs markedly from Congress's action on H.R. 1 which involved the deletion of specific retroactivity language.[3]

B. Floor Statements And Section-by-Section Analyses Submitted By The Prime Movers Of The 1991 Compromise Bill Clearly Demonstrated That The Act Would Operate Prospectively Only.

In addition to the deletion of the 1990 retroactivity language, statements by key Senate sponsors of the Civil Rights Act of 1991 further support the conclusion that a retroactive application of the Act was explicitly rejected. Senator Dole, in a section-by-section analysis of the bill,[4]

[3] *But see, Estate of Reynolds v. Martin*, 985 F.2d 470, 477 (9th Cir. 1993) and *Mozee v. Am. Commercial Marine Service Co.*, 963 F.2d 929, 933 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 207 (1992).

[4] Senators Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnel, Murkowski, Simpson, Seymour and Thurman endorsed this section-by-section analysis, as did the Bush Administration. 137 Cong. Rec. S15472.

clearly and unambiguously explained that the Act and its amendments do not apply to cases pending or arising before the date of enactment. 137 Cong. Rec. S15472-15478.

Senator Danforth—the primary architect of the final compromise Act—argued that the bill was intended to be applied prospectively, in accordance with Supreme Court principles of interpretation requiring statutes to be given prospective application only, unless Congress explicitly directs otherwise, citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1579 (1990) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). 137 Cong. Rec. S15483 (daily ed. Oct. 1991). Senator Danforth noted that he and the sponsors of the Act rejected the Supreme Court's analysis in *Bradley* as the relevant framework for interpreting the question of retroactivity of a bill. Following this statement, Senator Danforth introduced into the record an Interpretive Memorandum, expressing the intent of the original cosponsors of S. 1745 (except Senator Kennedy), which stated that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991).

II. SECTIONS 402(b) AND 109(c) OF THE CIVIL RIGHTS ACT OF 1991 DO NOT EVIDENCE AN INTENT TO APPLY THE REMAINING PROVISIONS OF THE ACT RETROACTIVELY.

A. The Language Of The *Wards Cove* Exception Does Not Evidence Any Congressional Intent To Apply The Remainder Of The Act Retroactively.

Adding to the prospective/retroactive application debate was § 402(b) of the Act, the so-called *Wards Cove*

amendment.[5] This provision specifically states that the Act should only be applied prospectively to certain disparate impact cases. Section 402(b) reads as follows:

> Notwithstanding any other provisions of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983 [*i.e.*, the *Wards Cove* case].

This section is the primary basis for arguments that the rest of the statute must be applied retroactively. Senator Dole, however, clearly discredited this argument when he introduced into the record a "Legislative History, Technical Corrections" memorandum. The memo states in relevant part,

> Section 402 of the Act, and this amendment to section 402 . . . will not apply to cases arising before the effective date of the Act . . . absolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provision of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended . . . [n]ot only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402 and this amendment, but it would be extremely unfair.

[5] Section 402(b) was inserted at the insistence of Alaska Senators Murkowski and Stevens, who were motivated by constituent interests and a desire to avoid the battle over retroactivity foreseen by Senator Kennedy. The Senators from Alaska wanted to ensure that the Wards Cove Packing Company would not be covered by the 1991 Act. Their floor statements clearly and unambiguously state that "[a]bsolutely no inference is intended or should be drawn from the language of this amendment to Section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).

The full text of the memorandum can be found at 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).[6]

Even Senator Kennedy, in his statements on the Senate floor both before and after the addition of the *Wards Cove* amendment, did not state that retroactive application of the bill was his intention or the intention of the collective body. Instead, he stated that the courts will determine whether the bill will apply to cases and claims that were pending on the date of enactment. 137 Cong. Rec. S15485. Senator Kennedy acknowledged that he disagreed with the supporters of the bill on the issue of nonretroactivity. *Id.*

Finally, Section 402(b) would not be rendered meaningless if it were not used to make the 1991 Act generally retroactive. As the legislative history clarifies, this par-

[6] Following Senator Dole's analysis of the *Wards Cove* amendment, Senator Durenberger also asserted that the bill was to be applied prospectively:

> I want to be clear that this vote does not change my view that the bill is completely prospective. . . [s]ome may attempt to argue at a later date that [the *Wards Cove* exemption] creates an inference that the bill, in general, is retroactive. . . that is the wrong conclusion to draw from this resolution. . . [w]e all know that the bill applies prospectively because that is what the plain language of the civil rights bill states.

The full text of Senator Durenburger's statement may be found at 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991).

Senator Simpson also agreed that the provisions of the Civil Rights Act were to be applied prospectively and that adoption of the *Wards Cove* amendment did not alter that aspect of the bill's application:

> By including specific language to make it clear that the Wards Cove Co. will not be treated retroactively, I in no way am implying that all other companies with litigation pending on the date of enactment should be treated retroactively. To the contrary, I read section 402 of S. 1745 to apply the bill prospectively to all parties, so that no one with litigation pending on the date of enactment would have the rules changed on them.

Id.

ticular section was added for the specific and exclusive purpose of making absolutely certain that the disparate impact provisions would *not* apply to the Wards Cove Packing Company in its pending litigation, a company that had invested 24 years to defending a claim of disparate impact discrimination. 137 Cong. Rec. S15953, S15963, S15966 (daily ed. Nov. 5, 1991). *See also Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Mozee v. Am. Commercial Marine Serv. Co.*, 963 F.2d at 933; and *Thompson v. Johnson & Johnson Mgmt. Info. Crt.*, 783 F. Supp. 893, 895 (D.N.J. 1992).

B. The Non-Retroactive Language In The Extraterritorial Exception Does Not Indicate That Congress Intended The Act Generally To Apply To Pending Cases.

Nor does the language of the extraterritorial exception in § 109(c) convey a congressional directive to apply the remainder of the Act's provisions retroactively. Section 109(c), which relates to extraterritorial application, states that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Like Section 402(b), this section relates specifically to a case recently adjudicated by the Supreme Court, *EEOC v. Arabian Am. Oil Co.*, 111 S.Ct. 1227 (1991). *Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Maddox v. Norwood Clinic, Inc.*, 783 F. Supp. at 584 ("Section 109(c) is known as the 'American Arabian exception' in reference to the Supreme Court's decision in *EEOC v. Arabian American Oil Co. . . .*"). *See also Guillory-Wuerz v. Brady*, 785 F. Supp. 889 (D.Co. 1992).

Thus, because §§ 402(b) and 109(c) were included for clear, self-contained, and limited purposes, no inferences about the retroactive application of the remaining provisions of the Act can be drawn from either § 402(b) or § 109(c). *Mozee*, 963 F.2d at 932-33; *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1373 (5th Cir. 1992).

C. The Circuits That Applied The Act Only Prospectively Have Found That Section 109(c) And 402(b) Were Only To Be Reassurances That The Act Will Not Apply To Specific Cases.

Six circuits have considered and rejected the argument that the prospective language in §§ 109(c) and 402(b) indicates an intent to apply the rest of the 1991 Act retroactively. *Butts v. City of N.Y. Dept. of Housing*, 61 Fair Empl. Prac. Cas. (BNA) 579 (2nd Cir. 1993); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1557 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d at 890 (D.C. Cir.); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1373 (5th Cir.); *Mozee*, 963 F.2d at 933 (7th Cir.); and *Fray*, 960 F.2d at 1377 (8th Cir.). These courts have determined that the prospective language should be construed merely as an extra assurance that the Act will not apply to specific cases.

The court in *Butts* held that the inclusion of the two provisions did not mean that the Act as a whole was retroactive. The court stated,

> [T]here is no suggestion that either [§§ 402(b) and 109(c)] was added against a background assumption that Congress intended the entire Act to be retroactive. They seem to have been inserted by individual legislators to protect constituent interests against the possibility that the statute ultimately would be held retroactive in the full knowledge that the retroactivity question was an open one that could go either way in the courts. The floor statements of Senators Dole and Murkowski that no inference should be drawn from the addition of § 402(b) considerably bolster this conclusion.

Butts, 61 Fair Empl. Prac. Cas. (BNA) at 588.

The *Vance* court also found that §§ 109(c) and 402(b) did not indicate that the Act is retroactive. *Vance* considered and rejected the holding of *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992),

which stated that the prospective only nature of the two provisions confirmed that Congress intended the Act to apply retroactively. The *Vance* court was unpersuaded by the *Davis* court's reasoning:

> The negative inference (that Congress intended general retroactivity) that the *Davis* court drew from sections 109(c) and 402(b) is an unhelpful legal fiction given the reality of a sharp conflict between legislators on the retroactivity of the Act generally. . . . Congress probably only intended for sections 109(c) and 402(b) to minimize, in specific instances, the risk posed by uncertain outcomes in the courts on the general retroactivity issue. And when a court holds that the Act *generally* applies prospectively, the court does not render sections 109(c) and 402(b) 'entirely redundant' nor inoperative. Those sections operate to ensure that although *some* court might hold the Act retroactive as a general matter, *no* court may hold that the Act applies in *Wards Cove* or in a section 109 case where the conduct predates enactment.

Id. at 1577 n.9 (citations omitted).

In *Gersman*, the District of Columbia Circuit indicated that §§ 109(c) and 402(b) could possibly be viewed "not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890. The *Gersman* court also noted that it was certainly reasonable for the Alaska legislators to wish to reassure the *Wards Cove* defendants that the Act would not apply to the 24 year-old discrimination case, given the potentially drastic impact of retroactive application of the Act to the company. *Id.*

The Seventh Circuit in *Mozee* also refused to find the prospective language of §§ 109(c) or 402(b) as probative of congressional intent, recognizing that these sections were merely extra "assurance[s]," 963 F.2d at 933, and the court in *Fray* echoed this sentiment. 960 F.2d at 1377. Likewise, in *Johnson v. Uncle Ben's, Inc.*, the Fifth Circuit criticized the 109(c)/402(b) argument as

"too much negative implication." 965 F.2d at 1373. The *Johnson* court indicated that the negative implication argument was unpersuasive given the remainder of the Act's history. *Id.*

Thus, six circuits held that §§ 402(b) and 109(c) do *not* allow an inference that the Act as a whole would be applied retroactively. Because the sections are merely additional assurances that the Act will not be applied retroactively to specific cases, they should not be used to impute a retroactive effect to the Civil Rights Act of 1991.

III. IN ADDITION TO THE LEGISLATIVE HISTORY'S PROSPECTIVE APPLICATION, THE CIVIL RIGHTS ACT OF 1991 AFFECTS SUBSTANTIVE RIGHTS AND LIABILITIES OF INDIVIDUALS AND THEREFORE MUST BE APPLIED PROSPECTIVELY.

A. This Court Held In *Bennett* That A Statute Is Applied Prospectively When It Affects Substantive Rights And Liabilities. Since The Civil Rights Act Of 1991 Affects Substantive Rights And Liabilities, It Must Be Applied Prospectively.

This Court has dealt with the issue of retroactivity of statutes in two ways. One line of cases begins with *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the plaintiffs brought an action to compel desegregation of the public schools of Richmond. While the case was on appeal, Congress enacted § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617, which granted federal courts authority to award attorneys fees to a prevailing party in a school desegregation case. The court of appeals ruled that the provision had prospective effect only, but this Court reversed.

In arriving at this conclusion, this Court held,

> [A] court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Id. at 711. In elaborating on this rule, this Court stated that an intervening change will not be applied to a pending action where it "would infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720.[7]

Against this backdrop and in a second line of authority, *Bowen v. Georgetown University*, 488 U.S. 204 (1988) reiterated the principle that, "Retroactivity is not favored in law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208.

The tension between *Bradley* and *Bowen* was revisited by the Court in *Bennett v. New Jersey*, 470 U.S. 632 (1985). In *Bennett*, the federal government was trying to recover from the state of New Jersey federal grant funds allegedly misused during the years of 1970-72. While the case was pending, Congress amended the statute governing grants in 1978. In holding that the Act would be applied prospectively, the *Bennett* court noted the *Bradley* court's limitation on the retroactive application of statutes: a court will not retroactively apply a statute when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Bennett*, 470 U.S. at 639.

The *Bennett* court concluded: "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639. Thus, according to this Court in *Bennett*, a statute that affects substantive rights and

[7] As noted above, however, *Bradley* indicated that the ultimate exclusion of original language on the retroactivity issue provided evidence of congressional intent on this issue. Thus, where initial language on point is deleted, an inference of an opposite congressional intent can be drawn.

liabilities will have prospective effect only. *See also DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1393 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991) (Restoration Act would not be applied retroactively because it affected a substantive right by imposing substantive liability on defendants in their individual capacities).

The *Bennett* decision has been the basis of several circuit court opinions concerning the effective date of the Civil Rights Act of 1991. The Court of Appeals for the District of Columbia Circuit, for example, followed *Bennett* and agreed that a statute affecting substantive rights should be applied prospectively. *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992). As in the instant case (*Harvis*), the court in *Gersman* was presented with the issue of whether the Civil Rights Act of 1991 should be applied retroactively to a claim alleging discrimination in the termination of a contract.

The court, after examining *Bradley*, *Bowen*, and *Bennett*, held that statutes that affected substantive rights should be applied prospectively only. The court stated the following:

> The Supreme Court in *Bennett* did not purport to overrule *Bradley*. But it noted that the *Bradley* decision concerned allowance of attorney fees, while acknowledging the continued vitality of the 'venerable rule of statutory interpretation' followed in *Security Industrial* and *Greene* as applicable to 'substantive rights and liabilities.' Therefore, we conclude that the Court has given us the basis upon which we must now distinguish the applicability of the two presumptions. The *Bowen* presumption must apply in the case of changes in substantive law. That being said, and *Bradley* still apparently being recognized by the Supreme Court, we agree with the Fifth Circuit that the *Bradley* presumption of applicability of law as of the time of decision must per-

tain to 'remedial provision[s]—not substantive obligations or rights under a statute.'

Gersman, 975 F.2d at 898-899 (citations omitted). *Accord Johnson,* 965 F.2d 1363, 1374 (5th Cir. 1992); *Mozee,* 963 F.2d at 936 (7th Cir.); and *Banas v. Am. Airlines,* 969 F.2d 477, 483 (7th Cir. 1992). *See also Vogel v. City of Cincinnati,* 959 F.2d 594, 598 (6th Cir. 1992). Thus, a statute that affects substantive rights and liabilities should be applied prospectively.

B. Application Of The Provisions Of The Civil Rights Act Of 1991 Would Substantively Change The Rights Of The Parties To Litigation Pending At The Time Of Enactment.

The provisions of the Civil Rights Act of 1991 make substantive changes to the state of the law as codified by Title VII and 42 U.S.C. § 1981 by eliminating affirmative defenses, expanding the type of conduct that is actionable, providing jury trials for certain cases, and providing additional damages that were not previously available.

1. The provisions permitting jury trials and punitive and compensatory damages are substantive changes to the law.

Prior to the enactment of the Civil Rights Act of 1991, allegations pursued under Title VII were tried before a judge, and awards to successful claimants were limited to back pay and/or reinstatement and injunctive relief. Under the 1991 Act, employers can now be held liable for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages for conduct engaged in with "malice or reckless indifference." *See* Section 102. In *Johnson v. Rice,* 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D.Ohio 1992), finding that employers could theoretically be held liable for an additional $300,000 in compensatory damages to each plaintiff, the court indicated that "[s]uch a substantial

increase in a defendant's potential liability clearly 'creates a new liability in connection with a past transaction,' and leads to the inescapable conclusion that the compensatory damages provision of the Act is substantive in nature. . . ." *Id.,* at 34 (citations omitted).

Similarly, in *Maddox v. Norwood Clinic,* 783 F. Supp. 582 (N.D.Ala. 1992), the court agreed that the changes made by the Act are substantive. *Id.* at 586. Therefore, remedies such as these, where they were not previously available in the field of employment law, are substantive changes.

Moreover, under pre-Act law, a fundamental tenet of employment discrimination law is to "make persons whole for injuries suffered on account of employment discrimination." *See, Albemarle Paper Company v. Moody,* 422 U.S. 405, 418 (1975). Thus, the victims of discrimination should be, "so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co.,* 422 U.S. at 421 (*quoting* 118 Cong. Rec. 7186 (1972)). As illustrated above, the Civil Rights Act of 1991 changes this basic scheme by making punitive damages available, as well. *See* Section 102. The purpose of punitive damages is not to make the victim of discrimination whole, but to punish a bad actor. *Memphis Community School District v. Stachura,* 477 U.S. 299, 307 n.9 (1991). Thus, the availability of punitive damages is a radical departure from employment discrimination theory as practiced prior to the Civil Rights Act of 1991. Therefore, it is clear that the Civil Rights Act of 1991 substantively changes the law in order to provide new, additional types of damages for victims of unlawful conduct.

2. Other provisions of the Act eliminate substantive defenses previously available to employers.

In addition to providing for a jury trial and compensatory and punitive damages where intentional discrimina-

tion is alleged, the Act eliminates several substantive defenses that were available to employers under prior law. For example, section 101 of the Act reverses the Supreme Court's 1989 decision in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), to make post contract-formation conduct actionable under § 1981 of the Reconstruction Era Civil Rights Act. In *Patterson,* the Supreme Court had concluded that the language of § 1981 covered discrimination only in the formation of contractual relationships, such as hiring decisions, and under limited instances, promotion decisions. The Act amends § 1981 to extend its coverage to all conduct pursuant to the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. *See* Section 101.

Section 107 of the Act reverses the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775 (1989), which relied upon prior law in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), effectively eliminating the "same decision" defense. Prior to the 1991 Act, selection decisions shown to have been motivated in part by discrimination were not unlawful if the employer could prove it would have taken the same action based upon nondiscriminatory criteria. Section 107 eliminates this defense on the liability question by making the selection decisions at issue unlawful even if the employer can prove that other lawful factors would have caused it to make the decision. *See* Section 107.

These provisions of the 1991 Act, in addition to others which reverse specific Supreme Court decisions, *e.g., Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989) and *Martin v. Wilks,* 490 U.S. 754 (1989), are substantive in nature. *See* Sections 108 and 112. Decisions made during the course of an employment relationship based upon the state of the law prior to the Act may no longer be defensible because of the elimination of affirmative de-

fenses. Likewise, many employers faced with discrimination lawsuits may have made decisions during an investigation and the trial preparation that they might have made differently had they anticipated the elimination of these substantive defenses and the addition of the new remedies provided by the 1991 legislation.

It is of paramount importance that parties to a lawsuit have concrete, predictable standards by which to evaluate each case. Clearly, changing the rules of the game after discovery, trial preparation, and a hearing on the merits will substantially alter the rights of the employer in cases pending on the day of enactment.

Because the Civil Rights Act of 1991 affects substantive rights, the Act should be given prospective application only.

C. The Civil Rights Act Of 1991 Is Not Merely "Restorative"; The Act Affects Substantive Rights And Liabilities And Thus Must Be Applied Prospectively. An Explicit Intent To Restore The Law Retroactively Is Necessary For A Retroactive Application; Inferring Retroactive Intent Is Not Enough.

Any argument that the Civil Rights Act of 1991 is merely "restorative" and, therefore, should be interpreted retroactively is contrary to law and fact and must fail. The standard of clear congressional intent for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.,* 911 F.2d 1377, 1387 (10th Cir. 1990). *See also Fray v. Omaha World Herald Co., supra. Contra Ayers v. Allain,* 893 F.2d 732 (5th Cir. 1990) (The 1987 Restoration Act amendments held to be applicable to pending litigation based upon inferences attributed to the purpose of the statute).[8]

[8] The Fifth Circuit's opinion in *Ayers v. Allain* does not support application of the 1991 Act to pending cases, because the language

In *DeVargas*, the Tenth Circuit refused to interpret statutory language indicating Congress's desire to address certain Supreme Court decisions as "clear congressional intent" to restore retroactively. *Id.* at 1385. Indeed, *DeVargas* indicated that even when Congress expresses a restorative intent, retroactive application is not appropriate absent a clearer expression of purpose to apply the Act to pending cases. The text of the statute at issue in *DeVargas* contained the following provision:

> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . .; and
>
> (2) legislative action is necessary to *restore* the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Id. at 1384 (quoting Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added). The court also noted that the Senate report contained similar language, purporting to "overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, and to restore . . . the four major civil rights statutes that

---

and history of the Civil Rights Restoration Act of 1987 is significantly different from that of the 1991 Act. The 1987 Act states that its purpose is to "restore" the law. The 1991 Act's purpose is to provide "additional remedies." Moreover, the *Ayers* court failed to discuss *Bradley* or *Bowen* and did not recognize that both *Bradley* and *Bowen* will not apply a statute retroactively where the legislative history shows that prior retroactive language has been deleted prior to final passage. *Ayers*, however, does cite to a district court decision relying on uncontested floor statements that the bill was intended to apply to pending cases. *Leake v. Long Island Jewish Medical Ctr.*, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988). By contrast, the 1991 Act's history is replete with numerous statements rejecting retroactive application. In any event, *DeVargas* demonstrates that *Leake's* reliance on an individual floor statement is misplaced. 911 F.2d at 1386.

prohibit discrimination in federally assisted programs." *Id.* at 1384-1385.

Despite the clear intent to "restore" the law, the court held that there was "clear congressional purpose to overturn *Grove City College*, but no clear expression of intent regarding retroactive application of the Act's amendments." *Id.* at 1385. The court found

> [t]hat the expressed congressional intent in the Senate report to 'restore' section 504 to its pre-*Grove City College* interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read 'restore' to mean 'retroactively restore,' particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on *Grove City College* and its progeny prior to the passage of the Restoration Act in 1988.

Id.

The language of the Civil Rights Act of 1991 indicating that Congress acted in response to "recent decisions of the Supreme Court" does not evidence an intent to apply the provisions of the Act retroactively. In *Fray v. Omaha World Herald Co.*, the court noted that it searched long and hard and could not find anything in the Act or its legislative history which would indicate that retroactive overruling of *Patterson* was the intent of the legislature. *Fray*, 960 F.2d at 1377. For example, Section 2 of the 1991 Act finds that "additional" protections against discrimination are being provided; the word "restore" is not used. Moreover, the language in Section 3 of the Act clearly indicates that Congress intended to *expand* the law as articulated in certain Supreme Court decisions. *See* Section 3. Under *Devargas* and *Fray*, this language alone

cannot be interpreted as a collective intent to apply the provisions of the bill retroactively.

The court in *DeVargas* also cautions that to apply the provisions of a new law retroactively merely because the new law rejects a judicial interpretation is inconsistent with the constitutional division of authority between Congress and the Supreme Court. *Id.* at 1387. *See also Fray,* 960 F.2d at 1375. ("The presumption against retroactive application best preserves the distinction between courts and legislatures. The former usually act retrospectively . . . and the latter usually act prospectively"). The doctrine of separation of powers emphasizes that although it is Congress's prerogative to make the laws, the authority to interpret the law lies exclusively with the judiciary. *DeVargas,* 911 F.2d at 1387-1388, citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *See also, The Federalist* No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949).

DeVargas emphasized,

> This rule of retroactive application of judicial decisions flows directly from the Court's function of interpreting law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a *subsequent Congress* amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's 'restoration' efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity.

DeVargas, 911 F.2d at 1388 (emphasis added).

Moreover, application of the Civil Rights Act of 1991 to cases pending on its day of enactment raises additional constitutional questions. Where a new law contains punitive damages provisions, retroactive application may result in constitutional ex post facto and due process violations. *Louis Vuitton S.A. v. Spencer Handbags Corp.,* 765 F.2d 966 (2nd Cir. 1985) (declining to apply the Trademark Counterfeiting Act retroactively because to do so would present constitutional issues.) In *Louis Vuitton,* the Second Circuit refused to find that the retroactive application of the Act at issue would violate either the Ex Post Facto clause or the Due Process clause; however, "the presence of these concerns supports our preference for strictly prospective application." Id. at 972. Therefore, if retroactive application implicates such constitutional problems, prospective application of the statute is the better course. *Id.* In the cases at bar, the prospect of applying the 1991 Act to cases pending on its enactment date raises the specter of several constitutional questions. Thus, the wisest choice is to apply the statute prospectively.

CONCLUSION

The history of the Civil Rights Act of 1991 demonstrates the wisdom of *Bowen's* rule that retroactivity is not favored in law and that a statute should not be applied to pending cases unless Congress clearly expresses that intent. Indeed, it seems only logical that legislators who want a bill to apply to pending cases should be required to say just that.

Here, however, proponents of this legislation have failed to fulfill this basic requirement. They roundly criticized several of this Court's decisions as misinterpreting Congressional intent and claimed that they could do better. Ironically, the bill they crafted has generated thousands of hours of unnecessary attorney time just on the threshold question of the Act's effective date. Therefore, we urge the Court to apply the *Bowen* requirement that Congress must state clearly when a statute is retroactive. Perhaps

such a ruling will encourage Congress to say what it means instead of leaving its unfinished business to be sorted out by frustrated judges and litigants.

For the foregoing reasons, the *amici curiae* respectfully urge this Court to hold that the Civil Rights Act of 1991 does not apply to cases pending on the date of enactment.

Respectfully submitted,

MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Attorney for Amicus Curiae The Chamber of Commerce of The United States of America

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
KIMBERLY L. JAPINGA
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

June 25, 1993